2015

State of Utah Plaintiff/Appellee v. Michael John Edgar Defendant/ Appellant

Utah Court of Appeals

39564

Case No. 20150594-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

MICHAEL JOHN EDGAR,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for two counts of possession with intent to distribute a controlled substance, second degree felonies; two counts of possession of a controlled substance, class B misdemeanors; and one count of possession of drug paraphernalia, a class B misdemeanor, in the Fourth Judicial District, Utah County, the Honorable Lynn W. Davis presiding

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for two counts of possession with intent to distribute a controlled substance, second degree felonies, Utah Code Ann. §58-37-8(1)(a)(iii) (West Supp. 2015); two counts of possession of a controlled substance, class B misdemeanors, Utah Code Ann. §58-37-8(1)(a)(i) (West Supp. 2015); and one count of possession of drug paraphernalia, Utah Code Ann. §58-37a-5(1) (West 2012), a class B misdemeanor. This Court has jurisdiction under Utah Code Ann. §78A-4-103(2)(e) (West Supp. 2015).

STATEMENT OF THE ISSUES

1. Police found distributable amounts of methamphetamine and Oxycodone, along with a digital scale and other drug paraphernalia, in a safe stowed in the trunk of a car Defendant's wife was driving. The safe also

contained checks and identification documents belonging to people not involved in this case. Police later found marijuana in Defendant's bedroom along with checks similar to those found in the safe. During later questioning, Defendant admitted that the drugs in the safe were his and not his wife's. A passenger in the car told police that the safe and the drugs were Defendant's, and the evidence corroborated her statement.

Defendant later repeatedly contacted the investigating detective offering to reveal the identities of drug dealers in exchange for leniency. He claimed to know several dealers who trafficked in large amounts of drugs, including one from whom he could obtain pounds of heroin. There is no evidence that he ever discussed his requests for leniency with the prosecuting attorney. *See* Utah R. Evid. 410 (excluding statements "made during plea discussions with an attorney for the prosecuting authority").

Has Defendant shown that his counsel was ineffective because he did not:

a. object under rule 403, Utah Rules of Evidence, to testimony that Defendant offered to identify drug dealers in exchange for leniency?

b. object to the prosecutor's rebuttal closing argument asserting that defendant was an admitted drug dealer who was distributing pounds of heroin?

c. object that under rule 410, Utah Rules of Evidence, the detective's testimony that Defendant discussed with him the possibility of identifying drug dealers in exchange for leniency was inadmissible evidence of plea negotiations?

Standard of Review. Ineffective-assistance-of-counsel claims raised for the first time on appeal are reviewed for correctness. *State v. Isom*, 2015 UT App 160, ¶34, 354 P.3d 791.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Addendum A contains Utah R. Evid. 403, and 410.

STATEMENT OF THE CASE

A. Summary of facts.

Officers from the Utah County Major Crimes Task Force were surveilling Defendant's home in Lindon, Utah, when they saw a car leave. R446,451-53. Police followed the car. R453. They did not see Defendant enter the car and were not sure who was in the car, but hoped that it was Defendant. R453-54,524. Officers briefly lost sight of the car when it pulled behind a convenience store. R453-55. The car shortly reappeared, however, and police stopped it after observing several traffic violations. R455-56. They found two women in the car, Arja Aaltonnen and Heather Marsh. R456. Aaltonnen, the driver, identified herself as Defendant's wife. R456-57.

Police suspected that the women dropped Defendant off behind the convenience store, but no officer saw Defendant near the convenience store. R526. The convenience store was within a drug free zone. R487.

Marsh testified that Defendant was originally driving the car and that the women dropped him off at what she thought was the Lindon City Building. R558-64,571. She was not sure, however, exactly where they dropped Defendant off because she was lying down on the back seat at the time. R558-64,571. The building housing the Lindon City offices is located about a block north of the convenience store. R453-54,487;SE20.

Officers' suspicions were heightened when they questioned the women and received inconsistent statements. R457-58. A drug dog indicated that the vehicle contained drugs. R458.

Police found methamphetamine and a pipe in Marsh's coat pocket and another package of methamphetamine in her bra. R457-58,534. They also found a safe in the trunk that the drug dog indicated contained drugs. R459-60.

Defendant repeatedly called his wife's cellphone during the traffic stop. R460. One of the officers, Detective Palmer, instructed her to answer and then had her hand him the phone. R460-61. Detective Palmer spoke with Defendant and asked him to come to the scene. R461-64. Defendant refused, and offered to provide information about drug dealers in Utah County if Detective Palmer would release his wife and Marsh and not open the safe. R461,508. Detective Palmer would not agree to Defendant's proposal. R464.

Defendant eventually agreed to meet officers at a different location, but failed to appear there. R464-65. Officers instead discovered him trying to leave his house with a suitcase. R465. When he saw the police, Defendant threw the suitcase back inside the house and locked the door. R465. Officers arrested him and brought him to the scene of the traffic stop. R465.

Meanwhile, Detective Palmer obtained a search warrant for the safe. R466. He asked Defendant to give him the combination so he could "open it nicely." R466. Defendant refused, claiming that doing so "would implicate him." R466,542. Marsh testified that the safe was Defendant's, and that he had put it in the trunk before they left his house. R564-65. She also testified that Defendant used the safe to store drug paraphernalia and illegal drugs in amounts for both personal use and distribution. R565-66.

Detective Palmer forcibly opened the safe and found:

- 17.5 grams of methamphetamine, or about 20 personal doses;
- 28 Oxycodone pills in a prescription bottle whose label bore Defendant's name;
- 2 whole Alprazolam pills and half of a crumbled Alprazolam pill;
- additional methamphetamine packaged for individual sale;
- a digital scale;
- several syringes;
- unlabeled prescription bottles;
- spoons, including a spoon with burn marks on it;
- two glass pipes of the type generally used for smoking methamphetamine;

- two credit cards, neither of which bore Defendant's name or the name of anyone involved in the case; and
- payroll checks, a driver's license, correspondence, and bank deposit slips all belonging to an individual who was not involved in this case.

R467,471-86,506-08,544-48; State's Exhibits 5,6,7,8,9,10,11,12,13,14,15,16,17, 18,19,33.

During a search of Defendant's home, officers found in Defendant's bedroom:

- marijuana;
- a bong;
- additional checks similar to those found in the safe; and
- a temporary driver's license for someone not involved in the case.

R488-94,578-80;SE's 22,23,24,25,26,27,28,29,30,34.

Officers also found $540 in cash on Defendant. R494.

Detective Palmer arrested Defendant, who agreed to speak with him after waiving his *Miranda* rights. R496-97. Defendant admitted that the drugs in the safe belonged to him and insisted that his wife had nothing to do with them or anything else in the safe. R510-11. Defendant never denied knowledge of the safe or any of its contents. R512.

Defendant also offered to provide information about other drug dealers in exchange for leniency. R511. Detective Palmer discussed with Defendant the possibility of working as a confidential informant, but Detective Palmer

explained that he would have to consult the prosecuting attorney before he could make any such arrangement. R511-12.

Over the next several weeks, Defendant called Detective Palmer 15-20 times offering to work as a confidential informant in exchange for leniency on his drug charges. R512-13. Defendant claimed to know "several ... big players ... that carry weight," meaning that they distribute large amounts of illegal drugs, specifically methamphetamine. R514.

Defendant gave Detective Palmer some names. R514. The Detective also had Defendant make phone calls to alleged drug dealers. R514-15. The individuals that Defendant identified were selling drugs, but not in the quantities the Detective was investigating. R515. As a member of the Utah County Major Crimes Task Force, Detective Palmer was hoping "to climb the [drug-distribution] ladder versus go down." R446,515. Accordingly, Detective Palmer told Defendant that his offer to work as an informant was "just not going to work." R515.

Defendant also contacted a local DEA agent and asked whether the agent could help him with the charges in this case. R591-92. Defendant specifically asked for help with his charges involving Detective Palmer and the prosecutor assigned to this case. R592. Defendant claimed that he could provide the name of an individual who could supply Defendant with pounds of heroin from

Mexico. R593. He told the agent that Utah County officers were being unreasonable and refusing to work with him. R598-96.

The agent told Defendant that he would have to talk to the state prosecutor and local law enforcement officers before making any arrangements, and that he had no authority to make any "deals." R596. After speaking with local authorities, the agent told Defendant that "it wasn't worth it … to pursue" the individual that Defendant had identified. R597. Defendant responded with anger and antagonism. R596-98.

B. Summary of proceedings.

The State charged Defendant with two counts of possession of a controlled substance with intent to distribute in a drug free zone, first degree felonies; two counts of possession of a controlled substance in a drug free zone, class A misdemeanors; and one count of possession of drug paraphernalia in a drug free zone, a class A misdemeanor. R32-33. A jury convicted Defendant as charged, but did not find that any of the offenses occurred within a drug free zone. R324-28. The trial court therefore recorded Defendant's convictions for possession with intent to distribute as second degree felonies, and his remaining convictions as class B misdemeanors. R354. The trial court sentenced defendant to imprisonment for one to fifteen years on the two second

degree felonies and to jail for 180 days on the three class B misdemeanors, all to run concurrently. R354-55. Defendant timely appeals. R357.

SUMMARY OF ARGUMENT

A. Defendant argues that his counsel was ineffective because he did not object under rule 403 to testimony that he volunteered to identify drug dealers in exchange for leniency. Defendant has not rebutted the strong presumption that his counsel reasonably chose not to object to this testimony because he concluded that rule 403 would not exclude it. That rule creates a high bar to excluding relevant evidence. It applies only when the evidence's probative value is substantially outweighed by its danger of unfair prejudice.

Counsel could have reasonably concluded that the testimony had high probative value because it helped to explain who possessed the drugs in the safe. Although Defendant initially admitted to the detective that the drugs were his, his counsel argued at trial that the drugs were not Defendant's because he was not in the car when the safe was discovered in its trunk. Defendant's statements that he knew several high-level drug dealers, and that he could obtain large amounts of drugs from them, where therefore highly relevant to establishing that the wide variety and distributable amounts of drugs in the safe were his.

Counsel also could have reasonably concluded that the trial court would view defendant's repeated offers to identify drug dealers in exchange for leniency as highly probative because they were arguably tacit admissions of guilt. Defendant's requests for leniency arguably showed that he believed that the charges against him were valid. The evidence also had a low potential for unfair prejudice because Defendant's offers to identify drug dealers were always tied to his requests for leniency, therefore reducing the chance that the jury would consider the testimony only as evidence that Defendant knew drug dealers. Given all this, counsel could have reasonably decided that a rule 403 objection would be futile.

Defendant cannot show prejudice because a rule 403 objection would have in fact been futile and the remaining evidence against him was overwhelming. Defendant admitted that the drugs in the safe were his and the remaining evidence strongly tied him to those drugs.

B. Defendant next argues that his counsel was ineffective because he did not object to the prosecutor's closing argument that Defendant was an admitted drug dealer who was distributing pounds of heroin. Defendant claims that this argument was unsupported by the evidence because Defendant never admitted that the drugs in the safe were his, and claimed only to have access to someone who could supply him with pounds of heroin.

Defendant again fails to rebut the strong presumption that his counsel reasonably chose not to object to this testimony. Defendant did in fact admit that the distributable amounts of drugs in the safe were his. The evidence therefore supported the prosecutor's argument that Defendant was an admitted drug dealer.

The prosecutor's argument that Defendant admitted that he was distributing pounds of heroin was arguably a reasonable inference from Defendant's statements. But even if it were not, counsel could have reasonably decided that objecting to the misstatement would have been more harmful than helpful. Had counsel objected, the prosecutor likely would have clarified that although Defendant said only that he had access to someone who could supply pounds of heroin, his admission suggested that he was in fact obtaining heroin in those amounts. The prosecutor also could have emphasized again that Defendant offered to identify this heroin supplier in exchange for leniency—arguably a tacit admission of guilt. Additionally, this single, isolated misstatement was not inflammatory. Counsel could therefore reasonably decide to refrain from objecting because doing so likely would have emphasized negative aspects of the case.

Moreover, Defendant cannot show prejudice because the evidence against him was overwhelming.

C. Defendant finally argues that his counsel was ineffective because he did not object to the detective's testimony that Defendant offered to cooperate with police in exchange for leniency. Defendant argues that this testimony was inadmissible evidence of plea negotiations under rule 410, Utah Rules of Evidence. But Defendant asks for a rule 23B remand to develop further evidence on this issue and therefore concedes that the record is inadequate to decide it.

Although he nevertheless argues that his counsel was ineffective for not objecting to this testimony, this argument is improper because it relies on Defendant's extra-record affidavit attached to his rule 23B remand motion. The argument also fails because it is based on non-controlling authority. Counsel performs deficiently only when he ignores controlling law. In any event, the record refutes the argument. Rule 410 excludes only statements made to the prosecutor. All of Defendant's statements at issue here were made to the detective.

ARGUMENT

DEFENDANT HAS NOT SHOWN THAT HIS COUNSEL WAS INEFFECTIVE BECAUSE HE DID NOT OBJECT TO: (1) TESTIMONY THAT DEFENDANT VOLUNTEERED TO IDENTIFY DRUG DEALERS IN EXCHANGE FOR LENIENCY; (2) THE PROSECUTOR'S CLOSING ARGUMENT; OR (3) TESTIMONY THAT ALLEGEDLY RECOUNTED STATEMENTS MADE DURING PLEA NEGOTIATIONS

Defendant argues that his counsel was ineffective in three ways. First, he asserts that his counsel should have objected under rule 403, Utah Rules of Evidence, to testimony that Defendant offered to reveal the identities of drug dealers in exchange for leniency. Br.Aplt.8. Second, Defendant argues that his counsel should have objected to portions of the prosecutor's closing argument that allegedly misstated the evidence. Br.Aplt.14. Finally, Defendant argues that his counsel should have objected under rule 410, Utah Rules of Evidence, to testimony that allegedly involved plea negotiations. Br.Aplt.22. Defendant recognizes, however, that the record is inadequate to review this third issue and therefore seeks a remand under rule 23B, Utah Rules of Appellate Procedure, to develop evidence to support it. Br.Aplt.22; Motion for Remand.

Defendant has not shown that his counsel was ineffective in any respect.

A. Defendant cannot rebut the strong presumption that his counsel reasonably decided not to object under rule 403; nor has he shown prejudice.

Defendant first argues that his counsel should have objected under rule 403 to testimony from the detective and a DEA agent that Defendant

volunteered to identify drug dealers in exchange for leniency on these charges. Br.Aplt.8. He asserts that this testimony had low probative value because it did not help the jury to determine (1) whether the drugs in the safe belonged to him, or (2) whether he intended to distribute the drugs, where there was no evidence that the drug dealers he knew were connected with the charged crimes. Br.Aplt.9. Defendant contends that the evidence improperly "encouraged the jury to find [him] guilty because he knew drug dealers." Br.Aplt.11.

To prove that his counsel was ineffective, Defendant "must show '(1) that counsel's performance was objectively deficient, and (2) a reasonable probability exists that but for the deficient conduct [Defendant] would have obtained a more favorable outcome at trial.'" *State v. Lucero*, 2014 UT 15, ¶42, 328 P.3d 841 (quoting *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162); *Strickland v. Washington*, 466 U.S. 668, 687-89, 694 (1984). Defendant cannot do so.

1. Defendant cannot rebut the strong presumption that his counsel reasonably decided to forgo a rule 403 objection because the testimony had strong probative value and posed little danger of unfair prejudice.

This Court's review of counsel's performance begins with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997) (quoting *Strickland*, 466 U.S. at 689). The presumption exists because of the "variety of

circumstances faced by defense counsel" and "the range of legitimate decisions regarding how to best represent a criminal defendant." *State v. Tyler*, 850 P.2d 1250, 1254 (Utah 1993); *see also Strickland*, 466 U.S. at 689. The presumption also recognizes that, "[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Defendant can rebut this strong presumption only "by persuading the court that there was *no conceivable tactical basis* for counsel's actions." *Clark*, 2004 UT 25, ¶6 (emphasis in original) (quotations and citation omitted). The State is not required to articulate a reasonable explanation for counsel's acts or omissions. Nor does a defendant succeed merely because this Court cannot conceive of a tactical explanation for counsel's performance. Rather, "'the defendant'" always bears the burden to "'overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Benvenuto v. State*, 2007 UT 53, ¶19, 165 P.3d 1195 (quoting *Strickland*, 466 U.S. at 689) (emphasis added); *see also State v. Powell*, 2007 UT 9, ¶46, 154 P.3d 788. But when it is possible to conceive of a reasonable tactical basis for trial counsel's actions, then a defendant clearly has not rebutted the strong

presumption that his counsel performed reasonably. *See Clark*, 2004 UT 25, ¶7; *State v. Holbert*, 2002 UT App 426, ¶58, 61 P.3d 291.

Reasonably concluding that an objection will be futile is a conceivable tactical basis for not raising that objection. Futile objections do not affect the evidence before the jury. They do, however, have the potential to annoy or even alienate the jury. Such objections can also annoy and alienate the trial court and the prosecutor, with whom counsel may have interact with in the future. Thus, failure "to raise futile objections or motions does not constitute ineffective assistance of counsel." *State v. Kennedy*, 2015 UT App 152, ¶50, 354 P.3d 775.

Defendant's counsel could have reasonably concluded that it would be futile to object under rule 403. That rule presumes that evidence is admissible and imposes a high hurdle for excluding evidence. Relevant evidence may be excluded under the rule only "if its probative value is *substantially* outweighed by," among other things, "a danger of … *unfair* prejudice." Utah R. Evid. 403 (emphasis added). The rule "imposes … the heavy burden not only to show that the risk of unfair prejudice is greater than the probative value, but that it "'substantially outweigh[s]' the probative value." *State v. Jones*, 2015 UT 19, ¶29, 345 P.3d 1195 (quoting Utah R. Evid. 403) (alteration in original). "Given this bar, [courts] 'indulge a presumption in favor of admissibility.'" *Lucero*,

2014 UT 15, ¶32 (quoting *State v. Dunn*, 850 P.2d 1201, 1221-22 (Utah 1993)). Indeed, rule 403 "'is an "inclusionary" rule.'" *State v. Kooyman*, 2005 UT App 222, ¶26, 112 P.3d 1252 (quoting *State v. Ramirez*, 924 P.2d 366, 369 (Utah App. 1996)).

Evidence is unfairly prejudicial only when it "has an 'undue tendency to suggest decision upon an improper basis.'" *Lucero*, 2014 UT 15, ¶32 (quoting *State v. Bair*, 2012 UT App 106, ¶22, 275 P.3d 1050). Evidence "is not unfairly prejudicial simply because it is detrimental to a party's case.'" *Kooyman*, 2005 UT App 222, ¶26 (quoting *United States v. Magleby*, 241 F.3d 1306, 1315 (10th Cir. 2001)).

Counsel could have reasonably concluded that the challenged testimony had high probative value for two reasons. First, it was directly relevant to the disputed issue of who owned the drugs. Second, counsel could reasonably conclude that the testimony arguably showed that Defendant had tacitly admitted his guilt. The detective testified that Defendant repeatedly offered to identify "big players … that carry weight"—meaning "people who distribute … large amounts of illegal drugs"—"in exchange for leniency on these charges." R514. A DEA agent also testified that Defendant contacted him offering to identify an individual who could supply pounds of heroin if the agent would contact the detective and prosecutor in this case. R592-93.

This evidence was highly probative of who owned the distributable amounts of various drugs in the safe. Although Defendant initially admitted to the detective that the drugs were his, R510-11, his counsel argued at trial that the drugs were not Defendant's because he was not in the car when the safe was discovered in its trunk, R656. Evidence that Defendant had direct access to several suppliers of distributable amounts of drugs made it highly likely the large amounts and wide variety of drugs in the safe belonged to him. In other words, Defendant's admissions that he had access to drug wholesalers made it highly likely that he was a drug retailer.

For example, in *United States v. Haynes*, 372 F.3d 1164, 1167 (10th Cir. 2004), the defendant's statement that he knew a woman who manufactured methamphetamine using a particular method was admissible under federal rule 403, even though it showed that the defendant associated with drug dealers, because the admission was highly relevant to a disputed issue. Haynes was charged with attempting to manufacture methamphetamine after police found in his home various chemicals and equipment associated with manufacturing methamphetamine. *Id.* at 1166. Haynes claimed that he possessed the incriminating items only for making beer, and he introduced testimony that some of the incriminating items had non-criminal uses. *Id.* at 1166-67. One of the substances found in his home contained a substantial amount of phenyl-2-

propanone (P2P), and one method for making methamphetamine requires P2P. *Id.*

Haynes objected under federal rule 403 when the prosecution offered testimony that he told a DEA agent "that he knew a woman who manufactured methamphetamine using the P2P method." *Id.* at 1167. He argued that the evidence "'posed a danger that the jury would convict on the ground that [he] apparently associated with drug dealers.'" *Id.* (alteration in original). The trial court overruled the objection and "admitted the statement, saying that although it was prejudicial, it was also 'highly probative' of Defendant's knowledge." *Id.*

The Tenth Circuit affirmed. *Id.* It held that the statement was "relevant to show that Defendant was aware that P2P could be used to manufacture methamphetamine" and therefore "shed[] light on why Defendant possessed the various items seized from this home." *Id.* Its probative value therefore was not substantially outweighed by the danger of unfair prejudice. *Id.* (citing Fed. R. Evid. 403).

Likewise, defense counsel here could have reasonably concluded that Defendant's admissions that he had access to high-level drug dealers were highly probative of whether the drugs belonged to him.

Counsel could have also reasonably concluded that Defendant's statements were highly probative because they arguably amounted to tacit

admissions of guilt. Defendant arguably admitted that he had engaged in criminal behavior when, rather than disputing the allegations against him, he attempted to obtain leniency by offering to identify other drug dealers.

Additionally, the testimony's context reduced, or arguably eliminated, any danger for unfair prejudice. The testimony was always tied to Defendant's requests for leniency. R514,592-93. Thus, the jury did not hear only that Defendant knew other drug dealers. The jury would have therefore understood the testimony to be important because it amounted to implicit admissions of guilt, not merely evidence that Defendant knew other drug dealers.

Defendant cites several federal cases all holding that evidence that shows only guilt by association is inadmissible under rule 403. Br.Aplt.10-11 (citing *e.g. United States v. Lopez-Medina*, 461 F.3d 724, 741-42 (6th Cir. 2006); *United States v. Marshall*, 173 F.3d 1312, 1317 (11th Cir. 1999)). But none of those cases involved a defendant's admissions that he had access to distributors of large amounts of drugs, or his requests to reveal his sources in exchange for leniency. As explained, the evidence here showed more than just that Defendant "knew a criminal." *See Lopez-Medina*, 461 F.3d at 742. Defendant's cases therefore do not establish that counsel unreasonably chose not to object under rule 403.

In short, the challenged testimony was highly probative of Defendant's guilt and possessed little, if any, danger of unfair prejudice. Defendant

therefore has not rebutted the strong presumption that his counsel performed effectively by not objecting under rule 403.

2. Defendant cannot show prejudice because rule 403 would not have excluded the evidence and, even if it would have, the remaining evidence against him was overwhelming.

To establish prejudice, Defendant must show "'a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *State v. Hales*, 2007 UT 14, ¶86, 152 P.3d 321 (quoting *Strickland*, 466 U.S. at 695). A reasonable probability is one "sufficient to undermine confidence in the outcome." *Harrington*, 562 U.S. at 105 (quotations and citation omitted). Defendant must do more than show "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* "Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

Defendant cannot show prejudice because a rule 403 objection would have in fact been futile. For the reasons explained above, the rule would not have excluded the testimony because its probative value was not substantially outweighed by a danger of unfair prejudice. Because the failure "to raise futile objections or motions does not constitute ineffective assistance of counsel," Defendant cannot show prejudice. *See Kennedy*, 2015 UT App 152, ¶50.

But even if such a motion would have succeeded, Defendant still cannot demonstrate prejudice because the remaining evidence against him was overwhelming. There was no real dispute that the drugs belonged to Defendant. Most importantly, Defendant admitted to the investigating detective that the drugs in the safe belonged to him. R510-11.

In addition, Heather Marsh, a passenger in the car, testified that the safe belonged to Defendant, that he had put it in the trunk, and that he used the safe to store drugs. R564-66. The evidence corroborated Marsh's testimony. Defendant asked the police not to open the safe and he refused to give the detective the combination because he acknowledged that doing so "would implicate him." R461,466. A prescription bottle in the safe that contained Oxycodone had a label that bore Defendant's name, and checks similar to those in the safe were found with the marijuana discovered in Defendant's bedroom. R476-77,488-94. Finally, Defendant did not introduce any evidence to dispute the detective's testimony that the safe contained distributable amounts of methamphetamine and Oxycodone. R473,476-78. This, coupled with Defendant's admission that the drugs belonged to him, established his guilt for possession with intent to distribute even without the evidence that he claimed to know other drug dealers. Defendant therefore cannot show that he was prejudiced by any deficient performance arising from the lack of a rule 403

objection. Consequently, he has not shown that his counsel was ineffective for not making a rule 403 objection.

B. Defendant has not rebutted the strong presumption that his counsel reasonably handled the prosecutor's closing argument, nor has he shown prejudice.

Defendant next argues that his counsel should have objected to portions of the prosecutor's closing argument that allegedly "misstated the evidence and that were inflammatory." Br.Aplt.14. He argues that the prosecutor misstated the evidence when he argued—in the context of recounting Defendant's offers for leniency—that Defendant (1) admitted he was a drug dealer, and (2) said he was distributing pounds of heroin. *Id.* Defendant has not shown either deficient performance or prejudice.

1. Defendant has not rebutted the strong presumption that his counsel reasonably decided not to object because an objection would have been futile and served to emphasize negative aspects of the case.

During his rebuttal closing argument, the prosecutor reminded the jury of Defendant's offers to identify drug dealers in exchange for leniency. R670-73. He argued that Defendant admitted he was a drug dealer, and that he was distributing pounds of heroin. R672. The prosecutor stated:

> Got a drug dealer admittedly, trying to work off charges with the Major Crimes Task Force, the DEA, how many of us would have the wherewithal to call the DEA and say, Hey, I've got these drug charges, I need to work, I'm moving tons of weight, pounds of heroin.

R672 (Addendum B is a copy of the prosecutor's rebuttal closing).

Defendant asserts that this argument was improper, and therefore his counsel should have objected, because no evidence supported the assertion that he was an admitted drug dealer or that he was distributing pounds of heroin. Br.Aplt.16. Defendant is mistaken.

A prosecutor's closing argument is proper when it is supported by the evidence, or reasonable inferences from the evidence. *State v. Houston*, 2015 UT 40, ¶76, 353 P.3d 55. Counsel "'for both sides have considerable latitude in their closing arguments. They have the right to fully discuss from their perspectives the evidence and all inferences and deductions it supports.'" *Id.* (quoting *State v. Dibello*, 780 P.2d 1221, 1225 (Utah 1989)). The prosecutor's arguments here were well supported by the evidence and the reasonable inferences from that evidence.

Defendant first argues that "there was no evidence [of Defendant] stating that the drugs were his." Br.Aplt.16. On the contrary, the detective testified that when he asked Defendant about the safe full of drugs and paraphernalia found in the trunk of the car his wife was driving, Defendant admitted "that the drugs where his, they weren't hers at all." R510-11. Thus, the evidence did show that Defendant admitted that the drugs in the safe were his.

Further, Defendant did not dispute that the drugs that he admitted were his were in distributable amounts. The evidence therefore provided the prosecutor with a solid foundation from which to argue that Defendant admitted that he was a drug dealer.

Defendant's repeated offers to identify drug dealers that he knew also supported a reasonable inference that Defendant was an admitted drug dealer. As explained, Defendant told a DEA agent that "he was capable of getting pounds" of heroin from a "Mexican source." R593. A reasonable inference from Defendant's admission that he had access to pounds of heroin is that Defendant is a heroin dealer.

Defendant's admissions, and the reasonable inferences from those admissions, supported the prosecutor's argument that Defendant was an admitted drug dealer. The argument was therefore proper and any objection to it would have been futile. *See Houston*, 2015 UT 40, ¶76. Consequently, Defendant has not rebutted the strong presumption that his counsel reasonably chose not object. *See Kennedy*, 2015 UT App 152, ¶50.

Nor has Defendant rebutted the strong presumption that his counsel reasonably chose not to object to the prosecutor's argument that Defendant was "moving tons of weight, pounds of heroin." R672. Again, this statement was

arguably a reasonable inference from Defendant's claim that he had access to someone who could supply him with pounds of heroin.

But even if the prosecutor's argument was technically objectionable, the Sixth Amendment does not require counsel to object to every inaccuracy in a closing argument. *See State v. Thompson*, 2014 UT App 14, ¶71, 318 P.3d 1221 (recognizing that some "instances of prosecutorial misconduct, standing alone, may not have required an objection from trial counsel"). When counsel does not "object to a prosecutor's statements during closing argument, the question is 'not whether the prosecutor's comments were proper, but *whether they were so improper* that counsel's only defensible choice was to interrupt those comments with an objection." *Houston*, 2015 UT 40, ¶76 (quoting *Bussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir.1994)) (emphasis in original). One reason counsel can reasonably decide not to object to "improper" closing argument is to avoid "emphasiz[ing] the negative aspects of the case to the jury." *West Valley City v. Rislow*, 736 P.2d 637, 638 (Utah App. 1987). Defendant's case presents a prime example of an opportunity to employ that strategy.

Counsel could have reasonably concluded that objecting to the prosecutor's alleged misstatement would have given the prosecutor another opportunity to clarify his argument in a way that would have ended up in the same place—evidence that Defendant knew someone who could supply him

with pounds of heroin supported an inference that Defendant was getting pounds of heroin to sell himself.

Counsel could have also reasonably concluded that objecting would have allowed the prosecutor to again emphasize what the jury could arguably conclude were Defendant's tacit admissions of guilt. Had counsel raised the objection that Defendant now identifies, the prosecutor may have taken the opportunity to clarify that although Defendant did not directly admit that he was distributing pounds of heroin, he did admit that he had a source that could provide him with that amount, and that Defendant made this admission in the context of seeking leniency on these charges. Defense counsel could have reasonably decided that this clarification would have been more harmful than helpful because it would have served to reinforce the idea that Defendant's repeated offers to identify drug dealers in exchange for leniency were arguably tacit admissions of guilt.

Defendant asserts that counsel was required to object because the argument was "improper and inflammatory." Br.Aplt.18. But counsel could have reasonably decided that the prosecutor's statement about pounds of heroin was not inflammatory because it was a single, isolated remark. *See State v. Clark*, 2014 UT App 56, ¶34, 322 P.3d 761 (holding that prosecutor's improper remark during closing argument "was harmless beyond a reasonable doubt

because it was a singular, isolated statement and was not the focus of the prosecutor's argument").

In short, because conceivable strategic reasons support counsel's decision not to object to the prosecutor's closing argument, Defendant has failed to rebut the strong presumption that his counsel performed reasonably. *See State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162.

2. Defendant cannot show prejudice because the evidence against him was overwhelming.

Even if his counsel should have objected to the prosecutor's closing argument, Defendant cannot show prejudice. As explained, an objection to the statement that Defendant was distributing pounds of heroin likely would have done more harm than good.

Additionally, as explained, the evidence against Defendant was overwhelming. Defendant directly admitted that the drugs in the safe belonged to him, and he did not dispute that they were in distributable amounts. Furthermore, the jury could have reasonably inferred from his repeated requests for leniency that he had tacitly admitted his guilt. And other evidence strongly tied Defendant to the drugs in the safe and in his bedroom. Defendant therefore cannot show that he was prejudiced by any deficient performance that may have occurred. *See Hales*, 2007 UT 14, ¶86. Consequently, he cannot show

that his counsel was ineffective for not objecting to the prosecutor's closing argument.

C. The record is inadequate to resolve Defendant's claim that his counsel was ineffective for not objecting under rule 410 to testimony that allegedly involved plea discussions; in any event, the controlling law available to counsel would not have supported an argument that Defendant's discussions with police were plea negotiations.

Defendant finally argues that his counsel was ineffective for not objecting under rule 410, Utah Rules of Evidence, to the detective's testimony that Defendant offered to identify drug dealers in exchange for leniency. Br.Aplt.22. Defendant argues that this testimony was inadmissible because it involved statements made during plea negotiations. Br.Aplt.22-26. Defendant seeks a remand under rule 23B, Utah Rules of Appellate Procedure, to supplement the record with his testimony regarding his discussions with the detective. Br.Aplt.22. He notes that although the record contains the detective's testimony about alleged plea negotiations, "it does not contain any information about [Defendant's] views of those negotiations." Br.Aplt.23.

Although he recognizes that the record is inadequate to review this claim, Defendant nevertheless relies on his extra-record affidavit attached to his rule 23B motion to argue in his brief that his counsel was ineffective for not objecting to the detective's testimony under rule 410. Br.Aplt.22-26. This is improper. Defendant's extra-record affidavit is relevant only to determining whether a

rule 23B remand is appropriate. *See State v. Bredehoft*, 966 P.2d 285, 290 (Utah App. 1998) (affidavits supporting rule 23B motions are considered "solely to determine the propriety of remanding ineffective assistance of counsel claims for evidentiary hearings"). The affidavit is not part of the record on appeal and therefore cannot support a holding that counsel was ineffective.

Defendant's assertion that a rule 23B remand hearing is required to develop evidence on this claim necessarily admits that the current record is inadequate to decide it. This Court therefore cannot find, based on this record, that Defendant's counsel was ineffective for not objecting to the Defendant's testimony under rule 410. *See State v. Litherland*, 2000 UT 76, ¶16, 12 P.3d 92 (holding that because an "appellate court will presume that any argument of ineffectiveness presented to it is supported by all the relevant evidence of which [the] defendant is aware," if "the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively").

In fact, the record refutes Defendant's claim that his counsel should have objected to the detective's testimony under rule 410. That rule excludes only statements "made during plea discussions with *an attorney for the prosecuting authority*." Utah R. Evid. 410 (emphasis added). All of Defendant's statements

at issue here were made to the investigating detective, not to the prosecutor. R511-14.

Defendant argues that rule 410 can be read to include statements made to a law enforcement officer who represents that he has authority to negotiate a plea bargain. Br.Aplt.24-25. He relies entirely on non-controlling authority to support this novel interpretation. Br.Aplt.24-25. This alone defeats his argument that his counsel performed deficiently.

A showing of deficient performance must be based on "the law in effect at the time of trial." *State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993). In other words, to perform deficiently, counsel must disregard "controlling appellate law" that existed at the time of trial. *State v. Kerr*, 2010 UT App 50, ¶9, 228 P.3d 1255; *see also In re N.A.D.*, 2014 UT App 249, ¶6, 338 P.3d 226 ("Because there was no basis in existing law for N.A.D.'s counsel to have requested that the juvenile court judge recuse herself, N.A.D. cannot show that his counsel performed deficiently."). Defendant does not identify, not could the State find, any controlling authority interpreting rule 410 as he does. Defendant therefore cannot show that his counsel performed deficiently.

But even if Defendant could base his claim on non-controlling authority, the record contains no evidence that the detective represented that he had any authority to engage in plea negotiations. Rather, as Defendant acknowledges,

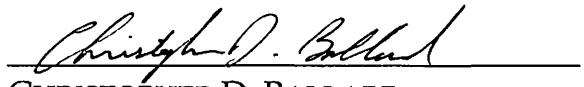
the "detective testified that before he could make a deal with [Defendant] he had to talk to the prosecuting attorney." Br.Aplt.22 (citing R511-12). Defendant therefore cannot show from this record that his counsel was ineffective for not objecting to the detective's statements under rule 410, because that rule was inapplicable even under his novel reading. *See* Utah R. Evid. 410.[1]

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on 20 April 2016.

SEAN D. REYES
Utah Attorney General



CHRISTOPHER D. BALLARD
Assistant Solicitor General
Counsel for Appellee

[1] Defendant's rule 23B affidavit proffers that the detective represented that he could reduce Defendant's charges if Defendant cooperated. Br.Aplt.23-24. As explained in the State's opposition to the remand motion, this Court should deny the motion because it is based on non-controlling authority, and counsel is not required to raise novel arguments based on non-controlling authority. Additionally, Defendant never proffers that he told his counsel about the detective's alleged representations that he could reduce Defendant's charges.

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 6763 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

CHRISTOPHER D. BALLARD
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on 20 April 2016, two copies of the Brief of Appellee were ☑ mailed ☐ hand-delivered to:

Emily Adams
Adams Legal LLC
PO BOX 1564
Bountiful, UT 84011

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

Lee Nakamura

Addenda

Addendum A

Utah R. Evid. 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

2011 Advisory Committee Note.

The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 403. *See also* Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." *See also Smith v. Estelle*, 445 F. Supp. 647 (N.D. Tex. 1977)(surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314 (Utah 1979); *State v. Johns*, 615 P.2d 1260 (Utah 1980); *Reiser v. Lohner*, 641 P.2d 93 (Utah 1982).

Utah R. Evid. 410. Pleas, Plea Discussions, and Related Statements

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

2011 Advisory Committee Note.

The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim. There was no comparable rule in the Utah Rules of Evidence (1971). However, withdrawn pleas of guilty have been ruled inadmissible by the Utah Supreme Court. *State v. Jensen*, 74 Utah 299, 279 P. 506 (1929).

Rule 410(4) does not cover plea negotiations with public officials other than prosecuting attorneys. There are still constitutional limitations on the use of statements obtained from suspects. *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964).

Addendum B

FOURTH DISTRICT COURT, PROVO DEPT.

UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 131403487
Plaintiff,	:	Appellate Court Case No. 20150594
v	:	Volume II of II
MICHAEL JOHN EDGAR,	:	
Defendant.	:	With Keyword Index

JURY TRIAL APRIL 13 & **14,** 2015

BEFORE

THE HONORABLE LYNN W. DAVIS

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 Ellen Way
Sandy, Utah 84092
801-523-1186

APPEARANCES

For the Plaintiff: CRAIG R. JOHNSON
Deputy Utah County Attorney

For the Defendant: GREGORY V. STEWART
Attorney at Law

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charges. Thank you for your time.

THE COURT: Thank you very much, counsel.

State may be heard.

MR. JOHNSON: Thank you, Your Honor.

All right, ladies and gentlemen, I want to respond to a few things that Mr. Stewart has brought up to help assuage your mind as you make this deliberation. I want to start with one of the instructions that he brought up. He talked to you about knowingly and intentionally and those are pretty self explanatory. Obviously if he didn't know these things were in the safe, if the safe wasn't his, if he - if we haven't shown that then he would not be guilty, I agree with that. But No. Instruction 16, that third line when it talks about defining intent when it says intent and then you skip down to the third line, it says intent must ordinarily be inferred from acts, conduct, statements and circumstances and that's frankly what kills Mr. Edgar in this case. If Detective Palmer had taken the phone call that the defendant made to Arja, his wife/girlfriend and had said, Hey, just trying to get ahold of my wife. She needed to get picked up from a meeting I just had. Where is she? What's going on instead of saying, Oh, crap. Do not open the safe, let them go and I will come and cooperate and talk to you and give up other drug dealers. Intent is inferred from statements, acts, conduct. Is that the conduct of someone who is

innocent, that did not knowingly and intentionally possess these things? Someone that then came to the scene after kind of monkeying around with police for 20, 30 minutes and not meeting up and delaying things? What is he doing during all this time? What's he trying to buy time for while he's not setting up and following through with the agreement they're trying to make with him? Is it possible that he's walking home realizing, Oh, crap, the police are onto me, I better get home get rid of whatever I have at my house before the police get a search warrant get back to my house. Isn't that more reasonable than some idea that, oh, he's just hanging out at home all night, watching TV, his girlfriend/wife takes the car out with his safe in it, he calls what, just to check in on them and then immediately launches into this negotiation with the police. Looking at it common sense, use your life experience. What is more reasonable here?

He talks about the pills bottle and tries to make it a bit of a moving target. So either it's a prescription for Mr. Edgar of oxycodone from a doctor that is legitimate oxycodone or did Detective Palmer misidentify it and it's all counterfeit drugs and it was never chemically tested so we don't know what this is. What is reasonable here? Is it reasonable that his doctor prescribed him 113 counterfeit oxycodone? Probably not. Is it more reasonable - or is it

reasonable that the police planted this. He's saying, Look at the pictures, it's not in the pictures. Well, so where did it come from? Detective Palmer pull it out of his pocket, throw it in there? Throw counterfeit drugs in there? I mean, what's reasonable here? It's reasonable that Heather Marsh's testimony matches up that he kept oxys in there and shockingly, here are oxys. Based on the detective's training and experience - this isn't his first day on the job - he testified that in his experience as not only just an officer, a drug officer but as a drug recognition officer, this is a common practice, look online, look at the markings, he did that, they matched up. It's oxycontin. Don't let that distract you.

The whole thing talking about the meth, 16 grams, 17.5 grams, whatever and that's consistent, isn't it? Detective Palmer said originally it's 17.5 grams, said the baggy weighs maybe a gram and the Crime Lab tested it and lo and behold it's 16 grams and based on his training and experience they can be sold in gram levels or 1.75 grams. He's seen all sorts, so whether it's up to 10 personal quantities or 15 personal quantities, if you're getting four or five hits which was the testimony off of each one of those quantifies, this is a distributable amount and when you match that up with additional baggies to package it in, it's packaged with intent to distribute when they're all in the

same place. Not to mention the digital scales here. He's not Betty Crocker, he's not making brownies. Why does he have digital scales there in the safe?

Again, what interest would Mr. Edgar have in any of this if he had just told the police, Hey, do what you will, I'm at home, I have no idea what's in the car. Safe? What safe? Why did he care so much to tell the police do not open that safe? Well, because he knowingly and intentionally knew what was in the safe because it was his including his pill bottle, including his stash of drugs which was consistent with what Heather Marsh said. Is it possible that Heather Marsh came in here to tell us all a big tale? That she's really the big drug dealer behind all this? She was sentenced over a year ago on a drug case associated with this. She took responsibility. I mean, what did she say? She was asked by Mr. Stewart, Did the police come down to the jail and try to flip you, try to get you to testify and work some deal out so you could get your misdemeanor, get your 45 days of jail, what a gift? No. There's no testimony saying that she did. There's no testimony saying she got anything for her testimony despite however he asked the question. So what you're left with is someone whose here, afraid, testifying about what happened a year and a half ago saying Hey, I'm not familiar with the area that much, I was living in Provo primarily, lived there in Lindon a day or two,

wasn't feeling good. I was laying down in the car. We were at home that night. Mr. Edgar comes home, he's angry saying, Hey, we got this appointment, gotta go, we've got to get the check deposited whatever, whatever. Okay. He says I've got a meeting at the city office building, let's go. He gets in the car - well, first he, what does she say, he takes the safe off of the couch and puts it in the car and secures it in the trunk. That's some details that stand out in her mind from that happening. Does that sound like something she's just making up from a year and a half ago or does it sound like something that really happened, the defendant transported this, that he knowingly and intentionally possessed these items? He's driving the car like he usually drives the car even though it's his girlfriend/wife's car. Sounds consistent.

Next thing she knows basically, she's laying down in the car, they make one stop, he gets out, girlfriend/wife goes to drive, Heather goes from the backseat to the passenger seat. That's how the police find them. Doesn't that sound more consistent? She, you know, a year and a half ago, again she's laying down, not feeling good, not familiar with the area as opposed to Detective Palmer and his four or five other officers conducting surveillance, trying to stay a safe distance behind these guys, trying to make sure they don't tip them off and they're observing where they're going

for the most part and then when they get to this 7-Eleven area and say, Hey, we lost contact with them behind the building for about 30 seconds. That's the evidence before you.

And then again, you look at the drug free zone, you know, I, I, maybe I'd agree more with Mr. Stewart if you know, this said 995 feet and it was within a few feet and maybe they cut here, maybe they cut here but under 500 feet takes up this entire property. Add another 500 feet and what have you got now? Fit anywhere in here. Beyond a reasonable doubt? Is it possible they, the police totally misjudged this by a couple of blocks, that they were never in this area? No. They were conducting surveillance, they lost them behind this area, it's within a drug free zone. Saying otherwise is not something you should consider as a reasonable doubt with respect to the drug free zone.

Mr. Stewart mentions with Agent Holmer, talking about the heroin, the comment about someone calls up out of the blue says they're Michael Edgar, what are the chances? So what does someone have to gain, right? I mean is it possible that one of us today could go and call the DEA, pretend to Michael Edgar - probably have to be a male - and say, Hey, I'm Michael Edgar, got some drug charges, want to work. Oh, I've got connections with all sorts of people, hook me up. Well so, if this were to actually go into

effect, Agent Holmer were to go and track down Mr. Edgar, sit down with him, can you imagine the conversation? Hey, got your call, let's do this. Mr. Edgar is going to be like what, I'm never talked to you. Someone must be using my name. What exactly is to be gained by any of that? But that's what they're positing is the explanation here. That's probably what happened. Oh, and the caller happened to know that I was the prosecutor and happened to know that Detective Palmer was the case officer on this case. Imagine the coincidence that that would happen. It's a doubt, certainly it's a doubt. Someone could have called and pretended they were Michael Edgar, gave a phone number that he when he called back, Hi, this is Michael Edgar, that happened too, is that reasonable doubt? And that's where you have to look at - and I'll just read to you the part of the Jury Instruction No. 19 again, the second paragraph where it says "there are very few things in this world that we know with absolute certainty. In criminal cases" - this is a criminal case - "the law does not require proof that overcomes every possible doubt." So certainly he's brought up some doubts, these bricks in the wall or bricks in the path, whatever, they're doubts, sure. You can look at them, isolate them, yeah, that's a doubt, someone could have called, that's possible. Is it a reasonable doubt looking at the totality of all the evidence? No, it's not. Considering this is the same

conduct he used with Detective Palmer the day of the first phone call, from the first in-person meeting, from four days later at the jail when he's still offering up to work. Imagine his surprise, you know, seven months later to get a call from DEA agents saying Mr. Edgar wants to work with us now, he's not satisfied with what you did. Well, his comments were, yeah, we didn't work with him. So again, information that's unique to Mr. Edgar was transmitted to this DEA agent whose here just to tell you about this conversation. He didn't have a prior relationship with him or me, goes to his credibility.

You know, Mr. Stewart didn't mention it much in his closing but during his cross examination of the Crime Lab, Amberlee Neibaur, he's asking her about prescription methamphetamine, isn't there such a thing as prescription methamphetamine? Sure, it's possible. Is that a doubt? Okay, that's a doubt. There's such a thing as prescription methamphetamine. Is that a reasonable doubt? No, it's not a reasonable doubt. Got a drug dealer admittedly, trying to work off charges with the Major Crimes Task Force, the DEA, how many of us would have the wherewithal to call the DEA and say, Hey, I've got these drug charges, I need to work, I'm moving tons of weight, pounds of heroin. Who else mentioned heroin? Mr. Stewart said no one else mentioned heroin. Heather Marsh mentioned heroin. What does the defendant keep

in his safe? Meth, heroin, pills, oxys or oxys, Clonazepam. Just because heroin and Clonazepam weren't in the safe, does that mean it's not his safe all of a sudden? No. Ultimately ladies and gentlemen, you're looking at the evidence that's before you that has to be reasonable and the reasonable explanation is that he's a drug dealer and you'll get two carts worth of evidence. I mean, is this all just a bad day for Mr. Edgar, someone is using his name, called the DEA? Someone has a safe of his that they've put all their stuff in? That's not reasonable.

When you focus on the possession with intent to distribute in a drug free zone, that's a lot of verbiage, a lot of clauses, a lot of phrases when you all run it altogether. What you need to look at is it doesn't mean that he had to intend to distribute those items at that 7-Eleven. That's not what we're here to say. We're saying he possessed them by that 7-Eleven and why did he possess them? Well, we talked about this, this isn't his personal use, isn't his personal stash, he possesses them because he's a drug dealer. He's possessing with intent to distribute. Where is he possessing them? Well, it's within 1000 feet of Lindon Elementary School, that's what makes it a drug free zone. So don't get hung up on, oh, we have to show that he had to possess them, distribute them right there within the drug free zone. He could have wanted to distribute them that

night, the next day, as long as he possessed them within that area with the intent to distribute them at some point, that's enough.

When you look at the evidence, reasons why the defendant possessed the safe because Mr. Stewart talked about, Oh, it was never fingerprinted. Oh, we should have had some more proof that way. You've also got Heather's testimony about he had access to it, how he had it from the couch, how he packed it, how he transported it into the car, the whole combination thing. Who had access to this? Why are the police monkeying around with him if they've got Arja and Heather who are giving up information left and right? Heather is saying, Oh, yeah, I've got it in my bra, but all of a sudden she's going to say, oh, but I'm not going to give you the combination for that safe but by the way there's a safe in the trunk. Or is more likely that she's telling the truth and saying, Hey, I had no combination to it, Arja had no combination to it. That's why the police were talking to Mr. Edgar. Why would he have the combination to it unless he owned it? And why would that be corroborated by the fact that he tells the police, I'll give you the combination but it might implicate me so I'm not going to do that. Well, you know, frankly saying that implicates you. So that didn't really work out.

Again, his pill bottle was inside and just

painfully over and over again he asked police not to open it. Why would you care if you don't know what's inside?

Then under reasons why he possessed with intent to distribute, again, half an ounce of meth, 28 pills of oxycontin, you know, if someone else is walking down the street and they have a pill bottle in their pocket, 20 oxycontin, and that's all they have, private personal use, private prescription, I agree. But when you look at it in totality of everything we have here, why is he possessing these things? To distribute them.

In the end ladies and gentlemen, he had a mobile pharmacy. You heard testimony about - a mobile pharmacy but he is not a pharmacist. He is a drug dealer. He told Detective Palmer that, he told Agent Holmer that and his actions and statements and the totality of the evidence back that up and I ask that you find him guilty on all counts. Thank you.

THE COURT: Thank you, Mr. Johnson.

Let's have the deputy then sworn please. If you'll stand and raise your right hand.

(Whereupon the bailiff was sworn)

THE COURT: Ladies and gentlemen, now is the time for your deliberations. We will deliver to you all of the exhibits. Here's the original jury verdict form.

Officer, please, if you'll take that and place that